

**SUPPLEMENTAL EPA REGION VIII GUIDANCE:
WATER QUALITY STANDARDS FOR
INDIAN TRIBES**

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SUPPLEMENTAL EPA REGION VIII GUIDANCE: WATER QUALITY STANDARDS FOR INDIAN TRIBES

I. INTRODUCTION

Comprehensive and technically-defensible water quality standards are critical to achieving the Clean Water Act goal of restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters. Water quality standards serve a twofold purpose under the Act: they establish water quality goals for all surface waters and they provide the basis for establishing water quality control requirements for regulated pollution sources.

With the 1987 addition of § 518(e) to the Act and EPA's 1991 promulgation of implementing final regulations, Indian Tribes now have an opportunity to participate in the water quality standards program. A Tribe assumes responsibility for the program following EPA approval of the Tribe's program application. Unlike some other Clean Water Act programs, the requirements for program assumption described in CWA § 518(e), as interpreted in section 131.8 of the water quality standards regulation, are the only requirements that must be satisfied by a Tribe to assume the CWA § 303(c) water quality standards program. Although grant funds are not available under CWA § 303(c), a variety of funding sources (e.g., CWA § 106 grants) may be used to fund the development, review, and revision of water quality standards.

Under the Act, tribal and state water quality standards must include designated uses, in-stream criteria sufficient to protect such uses, and an antidegradation policy. Administering a tribal water quality standards program is a long-term commitment. Because the Act requires that water quality standards be reviewed at least once every three years, a water quality standards program is a continuing responsibility.

EPA's role in the water quality standards program is to provide guidance, training, and technical assistance, set priorities, and review and approve or disapprove the adopted standards. Since the 1991 revisions to the water quality standards regulation, EPA Region VIII has worked to support tribal efforts to develop and adopt water quality standards. On January 29, 1993, EPA Region VIII issued a document titled ***EPA Region VIII Interim Guidance: Water Quality Standards for Indian Tribes***. The guidance was issued to assist Indian Tribes to qualify to administer a water quality standards program and develop an initial set of water quality standards. At the time, the Agency had already initiated efforts to simplify the process by which Tribes are approved to administer various programs, including the water quality standards program. Since that January 29, 1993 guidance was issued, the Agency has completed its efforts to simplify the program approval process for Indian Tribes.

Another development in the last two years is that the Region has gained additional experience with approving tribal applications to administer the water quality standards program. In particular, the process of reviewing tribal jurisdiction over non-member owned fee lands within reservation boundaries has been a subject of considerable effort and deliberation within EPA Region VIII and other EPA Regions. The Region also has gained experience in working with Tribes to develop an initial set of water quality standards. Based

on this experience, the Region believes it is in a better position to advise Tribes on qualifying for the program and developing standards.

Accordingly, this document is intended to provide guidance regarding:

- (1) the recent changes to the water quality standards program approval process;
- (2) tribal assertions of authority over non-Indian owned fee lands within reservation boundaries; and
- (3) developing an initial set of water quality standards.

II. CHANGES TO THE WQS PROGRAM APPROVAL PROCESS

On December 14, 1994, EPA promulgated a regulation that simplified the process by which Indian Tribes may qualify to be treated in the same manner as States for purposes of various environmental programs under the Clean Water Act (CWA), Safe Drinking Water Act, and Clean Air Act (see 59 Federal Register 64339). One of the amended regulations is the 40 CFR 131 water quality standards regulation, which had been previously amended on December 12, 1991 to establish a process by which Tribes could qualify to administer the water quality standards program (see 56 Federal Register 64876).

For the water quality standards program, the major modifications to the program approval process are summarized below. This summary is not comprehensive and the Region emphasizes that the full text of the final regulation and the December 16, 1994 transmittal letter from Richard E. Sanderson, Director, Office of Federal Activities, EPA Headquarters, should be consulted for a complete discussion (attached).

The major changes to the program approval process for water quality standards can be summarized as follows:

- (1) The phrase "treatment as a State" was deleted from the regulation. The Agency had previously decided to discontinue use of this phrase to the extent possible, and the December 14, 1994 simplification rule amended the water quality standards regulation to implement that decision. What was formally referred to as the "TAS approval process" will now be referred to, for water quality standards, as the "program approval process."
- (2) More flexibility was established with respect to the items to be included in tribal applications. Prior to the December 14, 1994 amendments, there were a number of items that tribal applications were *required* to include. These items are now only *recommended* for inclusion. However, the Region continues to have discretion to request additional information that it determines is needed to make a decision. The net effect is that both Tribes and the Region have more flexibility in determining the items and information that should be included in tribal program applications.

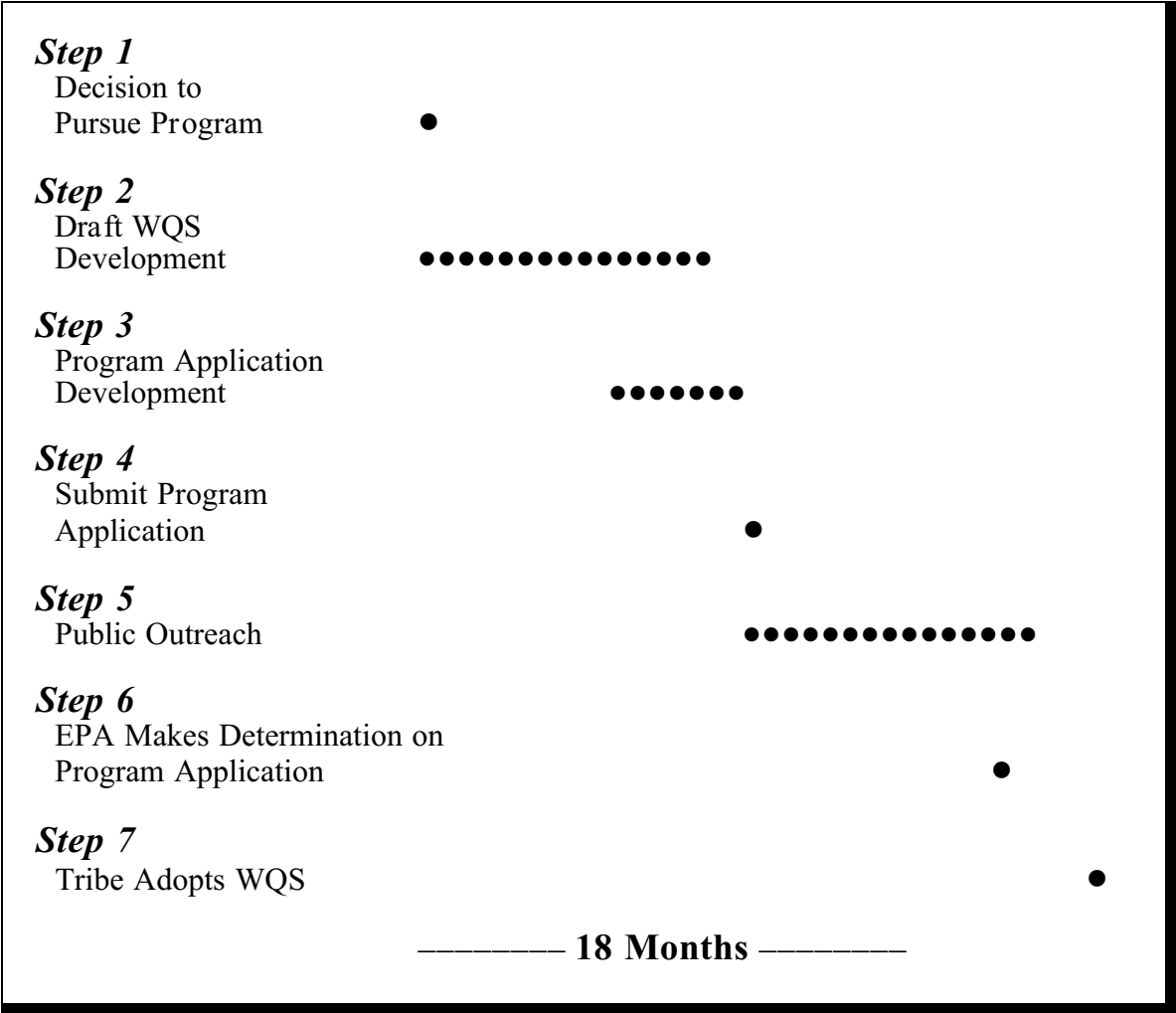
- (3) EPA no longer is required to evaluate "federal recognition" and "substantial duties and powers" for each program. Under the new simplified approval process, if a tribe has been previously determined by EPA under the Clean Water, Safe Drinking Water, or Clean Air Acts to meet these two criteria for program approval, these issues do not have to be revisited for any subsequent programs.
- (4) Tribes need not apply for program approval in advance of submitting water quality standards for approval. The preamble to the December 14, 1994 amendments clarifies that Tribes may optionally wait to submit the program application discussed in 40 CFR 131.8 along with their adopted water quality standards (which also must be submitted to EPA for approval). That is, tribal requests for EPA approval of the program application and the actual water quality standards can be handled in one submission to the Agency. This is merely a clarification of what has always been the case. **However, the Region recommends, rather than waiting for final tribal adoption of water quality standards, that Tribes apply for program approval as soon as a reasonably complete program application is assembled.** This will formally initiate EPA's application review process. See Figures 1 and 2. Note that EPA encourages Tribes to submit draft water quality standards with the program application as a means of improving the tribal showing of capability. Hopefully, this approach will lead to timely Agency approval of the Tribe's program application before the Tribe adopts final water quality standards. In this way, when the public review process and tribal adoption of water quality standards is ultimately completed, the adopted standards will be applicable (i.e., legally effective) under the CWA¹.
- (5) The process for reviewing tribal assertions of authority was simplified. The Region is no longer required to consult with the Department of the Interior where a tribal assertion of authority for water quality standards is subject to a competing or conflicting claim. However, the Region may continue to seek additional needed information from the Tribe or the commenting party, and may consult as it sees fit with other federal agencies.

¹ Note that lack of an EPA approval/disapproval action on the formally adopted and submitted tribal standards does not affect the legal effectiveness of such standards where the Tribe's program application has already been approved by the Region (see 40 CFR 131.21(c)).

Figure 1 - Example Eighteen Month Schedule for WQS Development

Preliminary (1-2 Years)	<i>Tribes may want to complete one or two years of surface water monitoring to support identification of attainable uses and implementation of standards. Although not required, this step is recommended.</i>
Step 1 (Month 1)	Tribes decide to develop water quality standards (WQS) based on their water quality problems, program resources, and program priorities.
Step 2 (Beginning Month 1)	Tribes begin to develop draft WQS, working closely with EPA and (ideally) State WQS program contacts. Completion of EPA's WQS Academy training course is highly recommended.
Step 3 (Beginning Month 5)	Tribes begin to assemble program application, including any readily-available information to help EPA evaluate jurisdiction on non-member lands.
Step 4 (Month 8)	Tribes submit WQS program application, including draft WQS to enhance showing of capability.
Step 5 (Beginning Month 9)	Tribes continue WQS development and begin to solicit input from interested parties (e.g., via public meetings, etc.). Broad input is actively sought to help avoid conflicts once tribal standards are adopted.
Step 6 (Month 14)	Where program approval criteria are met, EPA approves tribal WQS program application consistent with WQS regulation.
Step 7 (Month 18)	Tribes adopt WQS after satisfying public participation requirements, and submit WQS to EPA for approval/disapproval.

Figure 2 - Example Eighteen Month Schedule for WQS Development



III. AUTHORITY OVER NON-INDIAN OWNED FEE LANDS

In the preamble to the December 12, 1991 regulation that created an opportunity for Indian Tribes to administer a water quality standards program, the Agency established a position regarding how it would determine tribal authority to set water quality standards on non-Indian owned fee lands within reservation boundaries. The Agency took the position that such decisions would be made on a case-by-case basis consistent with the Supreme Court's decision in Montana v. United States. The Agency explained that, based on Montana, the extent of tribal authority over non-Indian activities on fee lands depends upon the effects of such activities on the Tribe, and that a tribe may regulate such activities when they threaten or have a direct effect on the political integrity, the economic security, or the health and welfare of the tribe. For purposes of implementing this test, the Agency established an operating rule that requires a showing that the potential impacts of regulated activities on the tribe are "serious and substantial."

Water quality standards provide the basis for water quality-based effluent limits included in permits for point source discharges issued under the National Pollutant Discharge Elimination System. Certification decisions pursuant to Clean Water Act § 401, which Tribes are authorized to make once the water quality standards program application is approved, also could affect a variety of activities that require a federal license or permit. Thus, prior to approving tribal applications for the water quality standards program, the Region applies the Agency's operating rule in evaluating tribal authority to set standards for waters on any non-Indian owned fee lands within the reservation.

Information specific to the reservation in question is needed for EPA to make a determination in applying this operating rule. For example, information is needed concerning activities on non-Indian owned fee lands that may have an effect on the quality of surface waters. To assist Tribes to submit applications that meet EPA's information needs on this question, the following provides some general guidance regarding the types of information that should be submitted.

Types of Information Recommended for Inclusion in Tribal Applications

The Region recommends inclusion of the following types of information with tribal water quality standards program applications. **In general, EPA is looking only for readily-available information, and Tribes should contact EPA Region VIII before working to develop new information.** For example, the Region generally does not expect Tribes to undertake detailed investigations that are not otherwise being conducted as part of the tribal water quality program. A possible exception may exist where a Tribe anticipates a challenge to its assertion of authority over activities on non-Indian owned fee lands and little information of the type discussed below is readily available. In these cases, which are expected to be rare, the Tribe may want to consider delaying the submission of their program application until additional information consistent with the discussion below is available. The Region believes that for many reservations, sufficient information to support an EPA decision on this issue has already been developed. The Region is available to answer questions on this topic and generally anticipates that discussions between the Region and the Tribe will be necessary to identify the needed information in each case. Although the following categories of

information will assist EPA in its jurisdictional determinations, EPA does not intend to imply that exhaustive information for each of the categories is necessary in all situations.

(1) Land use information. Any readily-available information on major land uses on non-Indian owned fee lands should be submitted (e.g., rangeland, dryland farming, irrigated farming, etc.). Such information will assist the Region to determine whether current activities on non-Indian owned fee lands have the potential to threaten beneficial uses of surface waters. Where readily available, a map displaying such information would also be of assistance to the Region, as such a map provides an illustration of the location of non-Indian owned fee lands (and the various land uses) compared to the location of tribal allotted, trust, or other tribal lands. Including the location of surface water resources on such maps would also be useful to the Region as a further means of evaluating whether tribal water uses may be threatened by pollution originating on non-Indian owned fee lands.

Example 1: Of the 1,200,000 acres of non-Indian owned fee lands within reservation boundaries, 700,000 acres are used as rangeland and 500,000 acres are used as cropland. All of the lands adjacent to Peoples Creek and Muddy Creek are irrigated farmlands owned by non-Indians.

(2) Pollution Sources. Any readily-available information on surface water pollution sources on non-Indian owned fee lands should be submitted. This can include general information about activities (e.g., mines, wastewater treatment plants) and detailed information on the location, quantity and quality of point source discharges (e.g., individual substances discharged). Information regarding non-point sources also should be submitted. For example, information such as types and quantities of fertilizers, pesticides and herbicides applied annually to crops on the reservation (and particularly for non-Indian owned fee lands) should be submitted where available. Information regarding on-site septic systems and landfills or other sites with potentially hazardous wastes also would be useful to the Region. Where Tribes have completed assessment reports for point or nonpoint sources, submission of such reports will very likely satisfy EPA's information needs regarding pollution sources.

Example 2: A home without a septic system on non-Indian fee land is discharging into an irrigation ditch which flows into Spring Creek. Fecal coliform bacteria counts as high as 250,000/100 ml have been monitored in the ditch.

(3) Waterbody Monitoring or Assessment Information. Tribal applications should include any relevant physical, chemical, and biological monitoring data. For example, results of monitoring surface water quality upstream and downstream of non-Indian property boundaries during baseflow and/or stormflow conditions can provide useful information about impacts to water quality potentially originating on non-Indian owned fee lands. Likewise, any assessment information, such as results of physical habitat evaluations, should be submitted. The Region

anticipates that this type of information will become more available in the future as tribal programs to monitor surface water quality and control pollution sources are further developed.

Example 3: Biological monitoring of portions of Elk Creek adjacent to non-Indian owned rangelands showed impacts to both macroinvertebrates and fish, compared to upstream control stations. Habitat evaluation showed high sediment accumulation in quiescent portions of the stream, unstable stream banks, and reduced riparian vegetation.

(4) Tribal Water Uses. Readily-available information on tribal uses of surface waters should be submitted. Information such as tribal use of surface waters for domestic, industrial, or agricultural supply, or information on tribal recreational use of surface waters should be provided to the Region. Where the tribal water supply is groundwater, any information regarding groundwater contamination resulting from surface water pollution sources should be provided to EPA. Any information concerning water-based ecological resources (e.g., high value wetlands) and tribal fishing and/or fish consumption uses also should be submitted (e.g., particular sport fish that are commonly caught). Such information enables the Region to evaluate whether presence or discharge of pollutants in surface waters may potentially affect the tribe and tribal resources. Where such information is available on a site-specific basis, such detailed information may be of assistance to EPA (e.g., streams where fishing or other recreational activities take place on a regular basis).

Example 4: The Tribe or tribal members use the surface waters on the reservation as a domestic water supply, as a fishery resource, for primary and secondary contact recreation, for livestock watering, and as an irrigation water supply. In particular, Spring Creek and the Blue River are heavily used by tribal members as recreational trout fisheries.

IV. DEVELOPING AN INITIAL SET OF WATER QUALITY STANDARDS

Over the next few years, many Indian Tribes in EPA Region VIII will begin the process of developing and periodically updating water quality standards for surface waters on their reservation. Although EPA's program guidance and technical assistance will assist Indian Tribes with this process, Tribes will still face difficult decisions on a host of issues. Tribes will find that, although there are federal minimum requirements that must be satisfied in most cases, there is also a significant level of flexibility to customize their water quality standards to the specific water quality problems on their reservation. For example, there is flexibility regarding the types and specificity of designated uses that may be adopted, the criteria that may be applied to protect designated uses, the implementation of antidegradation requirements, and various other aspects of establishing and implementing water quality standards. The staff

of EPA Region VIII are available to help tribal staff understand the available options and develop appropriate tribal water quality standards.

Another important consideration is that all tribal water quality programs face resource constraints. In the start-up and initial triennial review period, Tribes will likely find that it is difficult to develop a complete water quality standards program, including both the core provisions (discussed below) and comprehensive procedures for implementing each of the core provisions. For example, a number of States have yet to adopt detailed procedures explaining how their antidegradation policies are to be implemented. Even if tribal staff were able to develop a complete program, the resulting proposal would necessarily be somewhat lengthy and complicated, and explaining its technical basis to the satisfaction of the public, the Tribal Council, and others would present further problems.

The Region believes that, given these considerations, an approach that makes sense for the initial triennial review is to focus limited resources on those water quality standards provisions that will be most useful to the tribal water quality program. In *EPA Region VIII Interim Guidance: Water Quality Standards for Indian Tribes*, a number of options for developing an initial set of tribal standards are discussed. These options continue to be available and, in particular, EPA continues to recommend the option of using the standards of an adjacent State as a model. This approach has the important advantages of enabling the Tribe to: (1) establish a complete and defensible set of standards, and (2) achieve a degree of consistency with State standards for waters crossing reservation boundaries.

However, as part of the standards development process, Tribes also should identify which water quality standards provisions will be most useful for achieving their water quality goals. Water quality standards consist of a number of interrelated elements (e.g., numeric water column criteria, narrative criteria, biological criteria, antidegradation policy, designated uses, etc.). Because each of these elements has a specific purpose in the overall water quality standards program, Tribes may find that these various elements are useful in different ways. For example, Tribes may find that the antidegradation policy provides the best means of preventing future water quality problems in high quality water resources, while numeric criteria are more useful in establishing remediation targets for water quality problems that already exist. As a result, Tribes may wish to identify those standards provisions that will help to resolve their most pressing water quality issues, and target those elements for immediate attention. Likewise, Tribes also may conclude that, in order to limit reasonably the scope and complexity of the initial triennial review, some less-essential elements of standards are best delayed to a future triennial review. The Region is available to work with Tribes to develop appropriate water quality standards, and suggests that, initially, Tribes focus their limited resources on those elements of standards that will best address the highest priority water resource problems on the reservation.

Further, the Region expects that tribal water quality standards will evolve. For example, the initial set of tribal standards may include only basic elements necessary to support the tribal water quality program. Such initial standards may be based primarily on the standards of an adjacent State. However, as Tribes gain more experience with implementing water quality standards, and the tribal water quality program itself evolves, tribal standards are also likely to evolve to include revised or more detailed requirements and implementation procedures on topics of importance on the reservation. Although different Tribes will develop

their standards at different rates, the Region expects that, over time, all Tribes that administer a standards program will develop water quality standards and implementation procedures that meet all federal requirements and, more importantly, meet the needs of the Tribe.

Core Provisions

The core topics on which EPA Region VIII recommends that Tribes include provisions in their initial set of water quality standards are outlined below. Note that the core provisions outlined would provide basic water quality protection requirements and policies, but not necessarily detailed implementation procedures. Some, but not all of the core provisions are required components of standards pursuant to 40 CFR 131. As discussed above, Tribes may want to devote extra attention to those provisions that will be most useful to achieving their water quality goals. For example, where a tribal goal is to measure progress in controlling nonpoint sources on the reservation, Tribes may want to devote particular attention to describing the intended implementation of their narrative biological criterion (core provision # 6), and less attention to developing their mixing zone and dilution policy (core provision # 10). For each core provision, additional guidance, technical assistance, and recommendations are available from the Region upon request. In many cases the Region's recommendation will be to model the tribal standards on the water quality standards that have been adopted by an adjacent State.

For each core provision, additional guidance, technical assistance, and recommendations are available from the Region upon request.

EPA Region VIII recommends that the initial set of tribal water quality standards include, but not necessarily be limited to, the following:

- (1) **A section on purpose and authority to establish the tribal objectives for their water quality standards and to cite appropriate legal authority.** *This section helps to establish the intended link between water quality standards and programs, both regulatory and voluntary, for control of surface water pollution sources.*
- (2) **A provision covering the triennial review requirement applicable to all Tribal (and State) water quality standards programs under Clean Water Act § 303(c).** *Such triennial review is required of all tribal and state water quality standards programs. Including such a provision in the tribal standards provides notice to the public that the water quality standards will be reviewed, and updated where appropriate, at least once every three years.*
- (3) **A section including definitions of key terms.** *Water quality standards include numerous terms that need to be defined so that it is clear what is required by the standards.*
- (4) **An antidegradation policy consistent with federal minimum requirements.** *An antidegradation policy establishes requirements for protection of existing uses, high quality waters, and Outstanding National Resource Waters (ONRWs).*

- (5) **A set of narrative water quality criteria.** *Narrative water quality criteria are often very useful in addressing water quality problems that are not always fully addressed by numeric criteria or other water quality standards provisions. They also provide a legal basis for including whole effluent toxicity (WET) requirements in NPDES permits.*
- (6) **A narrative biological criterion, where the tribe has initiated biological monitoring or plans to do so within the next three years.** *Such a criterion describes the desired condition of water resources based on a direct measure of aquatic community health. Where adoption of biological criteria is a priority, Tribes should consider describing in their standards the purpose and intended approach to implementing such criteria. Where Tribes have not yet begun using biological sampling methods, it may be appropriate to delay adoption of a narrative biological criterion.*
- (7) **A section discussing the water quality standards applicable to wetlands.** *It may be appropriate initially to establish relatively simple water quality standards for wetlands; however, this decision may be influenced by the types and acreage of wetlands on the reservation and any current or anticipated development or other activities that may be affecting wetlands.*
- (8) **A provision identifying and describing the designated uses for all surface waters on the reservation.** *Water quality standards must include appropriate designated uses for each surface water segment. Designated uses in addition to those that are required to be considered for designation may be established to address the unique waterbody uses of each Tribe (e.g., ceremonial or religious uses).*
- (9) **A section identifying the numeric criteria that must be achieved to support each designated use.** *Tribes may rely, for example, on EPA criteria recommendations, State-adopted criteria, or other scientifically-defensible criteria. Such criteria establish clear water quality goals and serve to protect existing high levels of water quality.*
- (10) **A mixing zone and dilution policy, where there are existing or anticipated point source discharges.** *A mixing zone policy is an optional component of water quality standards where a Tribe elects to allow dilution for purposes of point source discharge permitting. For reservations where there are point source discharges, some type of formal tribal policy regarding mixing zones and dilution is recommended.*
- (11) **Analytical methods to be used in laboratory analysis of surface water samples.** *Water quality standards should include a reference to the methods to be used in analyzing samples taken for purposes of identifying water quality problems and monitoring progress toward achieving water quality standards.*

V. CONTACTS FOR MORE INFORMATION

Water Management Division

WQS Program Contacts

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